Arbitration CAS 2012/A/2843 International Association of Athletics Associations (IAAF) v. Hungarian Athletics Association (HAA) & Zoltan Kövago, award of 18 October 2012 (operative part of 25 July 2012)

Panel: Judge James Robert Reid QC (United Kingdom), President; Prof. Richard McLaren (Canada); Mr John Faylor (Germany)

Athletics (discus)
Doping (failure/refusal to submit to sample collection)
Hearing de novo

Under the IAAF Competition Rules, the appeal is by way of a complete re-hearing and not by way of a review of the decision of the National Anti-doping Organization. The decision on the appeal must depend on the evidence made available to the CAS Panel, rather than a re-consideration of the evidence before the National Anti-doping Organization.

THE PARTIES

1. The International Association of Athletics Associations ("IAAF") is the international body governing athletics.

2. The Hungarian Athletics Association ("HAA") is the national body governing athletics in Hungary and is a member of IAAF.

3. Zoltan Kövágó ("the Athlete") is a Hungarian discus thrower and an elite level athlete who has competed internationally for some 16 years. Among other achievements, he won a silver medal at the Athens Olympic Games in 2004, achieved second place in the IAAF World Athletics Finals in Monaco in 2004, and won a bronze medal at the European Athletics Championship in Helsinki on 1 July 2012. In August 2011, he was a member of the IAAF Registered Testing Pool.

THE APPEAL

4. This arbitration concerns an appeal by the IAAF against the 6 June 2012 decision ("the Decision") of the Doping Committee of the Hungarian National Anti-Doping Organisation ("the Committee") wherein the Committee determined that the Athlete did not fail to fulfil his obligations as specified in Article 12(1)(c) of the [Hungarian] Government Decree no.43/2011 (III.23.) and Rule 32.2(c) of the IAAF Competition Rules ("the IAAF Rules") on

the rules of anti-doping activities. The Decision was transmitted to IAAF by e-mail on 28 June 2012.

5. By its appeal, the IAAF sought the following rulings:

   (i) The IAAF appeal is admissible;

   (ii) The Decision of 6 June 2012 be set aside;

   (iii) Mr Kövágó was in breach of IAAF Rule 32.2(c);

   (iv) There are no grounds for a reduction of sanction under IAAF Rule 40.5 and, consequently, Mr Kövágó must serve the appropriate period of ineligibility under IAAF Rule 40.3(a), such period to start from the date of the CAS hearing with credit given for any period of suspension previously served;

   (v) All competitive results obtained by Mr Kövágó from the date of commission of the anti-doping rule violation through to the date of the CAS hearing shall be disqualified, with all resulting consequences, in accordance with IAAF Rule 40.8;

   (vi) The IAAF be granted an award for its costs in the appeal (including any advance of CAS costs), such costs to be assessed.

6. By their respective answers, the HAA and the Athlete requested:

   1) The Appeal by the IAAF against the Decision 6 June 2012 issued by the Committee be dismissed,

   2) The decision dated 6 June 2012 by the Committee be confirmed,

   3) The IAAF compensate the Respondents for the legal and other expenses incurred in connection with the arbitration, in an amount to be at the discretion of the Panel.

THE PROCEEDINGS BEFORE CAS AND CONSTITUTION OF THE PANEL

7. On 6 July 2012, the IAAF filed its Statement of Appeal and Appeal Brief against the Decision of the Committee and nominated Professor Richard H. McLaren as an arbitrator.

8. In the light of the upcoming London Olympic Games, the parties agreed that the matter should be dealt with by an expedited procedure pursuant to Art R52 of the Code of Sports-related Arbitration ("the CAS Code").

9. Pursuant to that agreement, HAA and the Athlete on 13 July 2012, nominated Mr John Faylor as an arbitrator and on 18 July 2012 filed their respective Answers.

10. On 17 July 2012, Judge James Robert Reid QC was nominated as President of the Panel and the Panel was constituted comprising of Judge Reid, Professor McLaren, and Mr

Faylor.

11. On 24 July 2012, the Panel conducted an oral hearing at Chateau de Bethusy, Avenue de Beaumont 2, 1012 Lausannne, Switzerland.

12. At the hearing, the Panel, in addition to considering all the documents placed before it and hearing the oral submissions made on behalf of the parties and the statement of the Athlete, heard evidence from H., B., A., and the Athlete who were all present in person. Further, it heard evidence by video-link from X., and by telephone from I. and M.

JURISDICTION AND RELEVANT IAAF RULES

13. The parties agreed that by virtue of Rule R47 of the CAS Code and Rules 42.1 et seq of the IAAF Rules, the CAS had jurisdiction to entertain the appeal and that by virtue of IAAF Rules 42.16 and 42.17, HAA, the Athlete were properly joined as Respondents to the appeal. Furthermore, all parties signed the Order of Procedure, confirming that CAS has jurisdiction in this matter. Neither of the Respondents raised an issue with the admissibility of the appeal.

14. By Rule R57 of the CAS Code, the Panel had full power to review the facts and the law. Further, by IAAF Rule 42.20:

"All appeals before CAS (save as set out in Rule 42.21) shall take the form of a re-hearing de novo of the issues on appeal and the CAS Panel shall be able to substitute its decision for the decision of the relevant tribunal of the Member or the IAAF where it considers the decision of the relevant tribunal of the Member or the IAAF to be erroneous or procedurally unsound. The CAS Panel may in any case add to or increase the Consequences that were imposed in the contested decision".

15. Article R58 of the CAS Code provides as follows:

"The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".

16. IAAF Rule 42.22 states as follows:

"In all CAS appeals involving the IAAF, CAS and the CAS Panel shall be bound by the IAAF Constitution, Rules and Regulations (including Anti-Doping Regulations)".

17. IAAF Rule 42.23 further provides as follows:

"In all CAS appeals involving the IAAF, the governing law shall be Monegasque law and the arbitrations shall be conducted in English, unless the parties agree otherwise".

18. The specific IAAF Rule in issue on this Arbitration is IAAF Rule 32.2(c) which provides:

"Athletes or other Persons shall be responsible for knowing what constitutes an anti-doping rule violation and the substances and methods which have been included on the Prohibited List. The following constitute anti-doping rule violations:

…

(c) Refusing or failing without compelling justification to submit to Sample collection after notification as authorised in applicable anti-doping rules or otherwise evading Sample collection".

19. By IAAF Rule 33.1:

"The IAAF, the Member or other prosecuting authority shall have the burden of establishing that an anti-doping violation has occurred. The standard of proof shall be whether the IAAF, the member or other prosecuting authority has established an anti-doping rule violation to the comfortable satisfaction of the relevant hearing panel, bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than the mere balance of probabilities but less than proof beyond a reasonable doubt".

20. By IAAF Rule 40.3 where an athlete is guilty of a violation of Rule 32.2(c), the period of Ineligibility shall be two years unless: (i) the conditions for eliminating or reducing the period of Ineligibility as provided in Rule 40.5 (Exceptional Circumstances) are met; or (ii) the conditions for increasing the period of Ineligibility as provided in Rule 40.6 (Aggravating Circumstances) are met. No party suggested during the course of the hearing that there were either Exceptional Circumstances or Aggravating Circumstances.

21. By IAAF Rule 40.10:

"Except as provided below, the period of Ineligibility shall start on the date of the hearing decision providing for Ineligibility or, if the hearing is waived, on the date the Ineligibility is accepted or otherwise imposed. Any period of Provisional Suspension (whether imposed or voluntarily accepted) shall be credited against the total period of Ineligibility served".

22. It was not submitted that any of the special circumstances "provided below" were applicable in the present case.

THE FACTS: PRELIMINARY

23. The central issue in the case is a short one, concerned with a brief period of time on 11 August 2011. There was also evidence regarding a further Sample collection from the Athlete on 15 December 2011. This evidence however was, at best, peripheral to the central issue.

24. The case put forward by the IAAF is that on the morning of 11 August 2011, H., a Doping Control Officer ("the DCO") employed by International Doping Tests & Management AB ("IDTM"), and his assistant, B. (together the "Doping Control Officials") identified the Athlete at Zold Iskola, the Athlete's regular training location (hereinafter referred to as the "Gym") and interacted with him. H. identified himself to the Athlete and informed him that he was being notified for an Out of Competition Doping Control, which was to be conducted

on behalf of the IAAF. The Athlete understood that the Doping Control Officials were present at the Gym for that purpose. Following notification, the Athlete left the Gym without providing a Sample. The Athlete therefore failed and/or refused to submit to Sample collection after notification or otherwise evaded Sample collection. There were no factors that would constitute "compelling justification" for such failure or refusal.

25. The Athlete contends that although he was at the Gym that morning, he did not meet or have any interaction with the Doping Control Officials and was unaware that anyone had attended to conduct a Doping Control test. He was an athlete of many years experience and was opposed to any form of doping. He had been tested many times over his career and had never had any problem with it. He had in fact been tested by HUNADO, the Hungarian anti-doping body, the following day and the test had proved negative.

26. On 20 July 2011, the IAAF issued a "mission order" to H. to conduct an out of competition test on four athletes, including the Athlete in the period of 20 July to 15 August 2011. The Athlete was at the time, one of the athletes on the IAAF Registered Testing Pool for out of competition testing by the IAAF. H. is a very experienced DCO who has been carrying out the work for some 22 years and has conducted between 4,000 and 5,000 tests.

27. H. decided to conduct the test on the Athlete on 11 August 2011. To this end, he refreshed his memory as to the appearance of the Athlete by looking up a photograph of him on the internet. He already knew the Athlete, having conducted tests on him on two or three previous occasions, including once at the Gym. He also checked the Athlete's registered whereabouts on the ADAMS system used to record the whereabouts of athletes in the Registered Testing Pool. He obtained a print out at 14.41 on 9 August 2011 showing that the Athlete had notified IDTM that he would be available at the Gym from 11.00 to 12.00.

28. The Athlete is an officer in the Hungarian army and in the course of 10 August 2011, as he put it, *"Because of my work, my daily arrangement changed"*. At 22.13 on 10 August 2011, he sent an e-mail to "whereabouts@iaaf.org" the appropriate e-mail address for notifying his change of whereabouts. The e-mail provided that the Athlete would be available *"11 and 13 August AM06-PM23 (5001, Szolnok, Kilian ut1., Hungarian Army 86. Helicopter Base, Hungary)"*. He received an automated response to the e-mail informing him that his updating had been received and that it would be added to his records. The parties were agreed that the Helicopter Base is some 18-20 minutes drive from the Gym, though the actual travel time would necessarily depend on the time of day and the traffic.

29. Because the e-mail was received after the close of the working day, the e-mail was not processed until the following day. It appears that the updating did not occur until 15.54 on 11 August 2011.

30. Early in the morning, at about 05.00, on 11 August 2011, H. set out with his regular assistant (and mother-in-law) B. to drive from H.'s home, south of Vienna to the Gym at Szolnok to effect the out of competition test in accordance with his Mission Order. It is a drive of about

5 hours.

THE FACTS: EVENTS AT THE GYM ON 11 AUGUST: THE IAAF VERSION

31. On H.'s evidence, he and B. reached the complex which includes the Gym at about 10.35 to 10.40, having had a little difficulty in finding it because H. had not been there for a while. Eventually, he saw they were in a street immediately behind the Gym. On arrival, they parked in the open space or car park outside the Gym.

32. H.'s evidence is that on entering the building, he and B. asked an old lady at the reception for the Athlete. She led them to the Gym which is an old-style gym at the back of the building. As they entered the Gym, H. saw the Athlete walking around in the gym hall. H. formed the view that the Athlete had been training because of his clothing and the fact that he had a towel around his neck. H.'s impression was that the old lady told the Athlete that someone was there to see him and she then left without saying anything to H. or his assistant.

33. In his "Mission Summary" dated 11 August 2011, H. described what then occurred. The document was prepared when he got home that day, between about 16.00 and 17.00. He typed his signature at the end but did not sign it manually. In it he stated as follows:

"As Zoltan came to us I showed him my ID card (IDTM) and told him that he is notified for OOCT on behalf of IAAF (it was 10.40am). I immediately had the feeling that he felt uncomfortable. He immediately turned away from us but was nodding with his head, what I assumed means ok or yes. Then he took his mobile phone and called someone. It was not a long talk but I heard that he was saying the word "Doping". Then he walked back a few steps and let us know by saying "come" and waved with his hands that we should go more in the back area of the gym, which meant to me that we could do the testing there and that there is maybe a room for doing the procedure. I also asked again if he understood that he was selected for a doping control. "Zoltan do you understand me that you are selected for a doping control?" And he was nodding with his head. Then he took the mobile phone again and had a short talk again with someone. In the mean time I was just preparing everything and wanted to show him also the official paper from IAAF and wanted to get his signature of the DCF when I realized that he moved a bit away from my side. My assistant was checking the toilet area in that time if it suitable for providing the sample. As his bag (see picture) was just beside me I thought that he might grab something to drink or an ID or so on the table next to the exit of the gym, but then he went outside of the gym and I stopped filling out the paper and went after him and called him: Where are you going Zoltan? But he didn't react and he went to his car which was parked just a few steps beside the gym's back entrance, jumped in and drove away. As the gym wall and door were made of glass, I could see the athlete from the time he went through the open gym door until he got into his car and drove away.

As everything happened rather quickly, I was not able to take a picture of him when he was driving away but I remembered his car and at least a bit of his car licence. (It was a silver Audi Q7 and the licence was starting with K- I guess for Kövágó)".

34. H. repeated this account in a document described as DCO Report dated 26 January 2012 which dealt not only with the events of 11 August 2011, but also the later events of 15 December 2011.

35. In his oral evidence, H. stated he had asked for the Athlete's identity card as he wanted to see it when he was filling out the paperwork and that the Athlete had gone over to the bag after finishing his second telephone call and looked in it. He thought that the Athlete might be going to get out a drink or something, but he believed that what the Athlete actually took out was a wallet and keys. The Athlete had gone to the desk where the big man was seated and then left the Gym.

36. B.'s written account of events was first made in a witness statement apparently made on 6 July 2012. She had previously countersigned the document of 26 January 2012. In her witness statement, she confirmed H.'s account in the document of 26 January 2012 and slightly amplified it.

37. After the Athlete's departure, according to H.'s Mission Summary:

"Then I headed back to the gym and asked the guys inside where Zoltan is going. I got no reply and only head shaking. There was one big guy, I remember him from my previous mission- he must be a kind of responsible person for that gym and he was also only shaking his head which meant to me he didn't know where Zoltan was going to. But I also had the feeling that he felt not comfortable. As already 35 minutes were gone I called IDTM to tell them what happened. We decided that we should stay there for the whole hour as per procedure provided. But we waited a bit beside the gym because I wanted to see what maybe happens when they other guys have the feeling that we left. As I was observing them I saw that the big guy I mentioned before was grabbing his bag and took it to himself. In that moment I went into the gym and he was surprised but he didn't say a word, and as I passed him to look around in the hall, I saw that he opened a locker where he put Mr. Kovago's bag inside and closed it immediately. (I took a picture of that from the big guy of his back). After waiting for the rest of the hour slot, 5 minutes before 12 pm everybody left the gym and the big guy locked everything and went away too. Then we also left home and took again one picture of the gym from outside".

38. H. produced three photographs which he had taken. These comprised a photograph of the bag on a chair beside what was identified as an oven. The photograph also showed a towel among other things on the top of the oven and H. said in his oral evidence that this was the towel which the Athlete had had around his neck when he first saw him. The photograph is timed at 11.20. The second photograph is timed at 11.28 and shows the "big man" watched by two others placing the bag in a locker. The third photograph shows the outside of the gym and is timed at 12.04. In cross-examination, H. said he had taken the pictures inside the Gym on his I-phone some 2 to 5 minutes after the Athlete had left. He thought the Athlete had left at about 11.10 or 11.15. B. stated that the photos inside the Gym suggested the pictures were taken 8 to 12 minutes after the Athlete had left.

39. H. also amplified his evidence as to his telephone calls to IDTM. He had called them and then had to wait for a call back. He thought that he had had to wait for some 25 minutes. The IDTM telephone records show that they called H. back at 11.43.45 in a conversation which lasted 11 minutes and 25 seconds. At 11.57.14, IDTM called the IAAF to inform the IAAF that the mission had been unsuccessful and at 12.01.49, IDTM called H. again. H.'s own telephone records are less detailed, but appear to show calls vis Ungarn-Vodaphone (ie the Hungarian arm of Vodaphone) that day.

THE FACTS: EVENTS AT THE GYM ON 11 AUGUST: THE RESPONDENT'S VERSION

40. The Athlete's version of events as to what occurred on 11 August 2011 was that he was required to be at his place of work, the Helicopter Base, from 06.00 on that day. He had learned this when he received the work roster on Wednesday, the previous day. It was for this reason that he had submitted an e-mail notifying the change in his whereabouts late that evening. He obtained permission to leave the base for a period of one hour, from 10.15 to 11.15 to attend the Gym in order to collect sports equipment comprising a belt, shoes, rope and two pieces of bandage. He produced a certificate dated 7 October 2011, and signed by the Base Commander Major General Lamos that he had been given permission to leave the Base to attend the Gym to collect sports equipment between 10.15 and 11.15 that day and that before and after that time, he was at the base. He attended at the Gym at about 10.40 for a period of 4 or 5 minutes only during which he collected his equipment. In that time, he did not meet or have any interaction with any doping control officers. He was entirely unaware that anyone was seeking to conduct Out of Competition Doping Control, although he accepted that he had seen two "strangers" at the Gym. He had collected the necessary equipment, had left by the same door as he had entered by without speaking to anyone at the Gym and had driven back to the base, arriving there a couple of minutes before the deadline.

41. He said that the bag photographed by H. was not his bag. The bag had been his. It had been given to him at the 2005 World Championships in Helsinki, but he had given it to M. at the Gym because he was not permitted by his sponsorship contract with Nike to use equipment from other brands. He had not reached into the bag. The towel in the photograph was not his. He had not had a towel around his neck when he was in the Gym. He had not been training in the Gym that day.

42. He said in his oral evidence that since he was in the Army, strict rules applied and there were severe consequences if he broke the rules. He had parked in the parking lot and entered the Gym through the back door. He went into the room where there were lockers but did not enter the main hall. There had been 10 to 12 people around in the main hall. He had not made any mobile telephone calls at the material time and had produced records to confirm that he had not done so. He had three mobile phones at the time and still has them. He was not supplied with a phone by the Army. He did have a silver Audi Q at the time. Its registration mark did begin with a K as did all similarly registered cars.

43. The following day he was subjected to an Out of Competition test by HUNADO the Hungarian anti-doping authority. This proved negative.

44. In support of the Athlete's case, the Panel heard evidence from A., a retired policeman who also trains in the Gym regularly. His evidence was that he was training at the Gym on the morning on 11 August 2011, when two foreign persons came to M. and inquired about the

Athlete. A. knows the Athlete well, since both of them had trained in the Gym for many years, often at the same time and regards him as a friend. A. was in the Gym the whole time the foreign persons were there. During this time, the Athlete was not in the Gym, so he did not meet the control officers.

45. A. said that the Athlete usually leaves his belongings in the Gym to help others who train there, so they could use his equipment (e.g.: the weight lifting belt), and do not have to buy their own. The Athlete had quite a lot of equipment in the Gym, and often did not even put it in his locker.

46. A. further stated that on this particular occasion, he was there until approximately when the Gym closed, and that whilst the Athlete could have been in the building, he had not been seen by A., and that he had not worked out there. He did not know everyone because the people using the Gym changed all the time.

47. The Panel heard telephone evidence from I. She had been working as door-keeper in the Gym since 2006. She worked a 12-hour shift, and was on duty when the Doping Control Officials came to the reception desk to look for the Athlete the morning of 11 August 2011. They spoke a foreign language and she only understood the Athlete's name. She further stated that since she heard the Athlete's name in what they were saying, she thought they must have been looking for him. She knew the Athlete because he had his regular trainings in the building. She thought she would show the Doping Control Officials to the Gym in the back. Since the Athlete was not in the Gym, she showed the control officers to the lessee of the Gym, M., hoping that he would be able to help them. After that, she went back to her place of work at the main entrance of the building where the reception desk was. Because the Athlete usually went in and out of the back door, she did not usually see him.

48. M. also gave evidence by telephone. He has been the lessee of the Gym since, he thinks, 2002, and knows the Athlete well since he has regularly trained there for many years. On 11 August 2011, a foreign man and woman were shown to him by I. He understood that they were looking for the Athlete, although he did not speak the language the man and the woman spoke.

49. M.'s evidence was that his desk is at the entrance of the Gym and he usually sat there, as he was when the Doping Control Officials entered the Gym. I. said they were probably looking for the Athlete, but both he and I. speak only Hungarian, and both understood just the one word 'Kövágó'. M. concluded (as I. did) that they were looking for the Athlete. He assumed that I. showed them to him because the Athlete was not in the Gym.

50. While the Doping Control Officials were talking to him, they did not show anything to identify themselves, which is why he did not know their names. Foreign persons had come to the Athlete several times in order to test him, but they had always shown some identification card, and whenever the Athlete was there, such people did not talk to him. Since he does not speak any foreign languages, he tried to use body language to show them that the Athlete was

not there, but he did not know whether or not this was understood. Although the Athlete was not there during the whole time, the control officers stayed until noon when he closed the Gym and they left too.

51. While the Doping Control Officials were waiting, M. said they were taking photos which did not bother him until the man started to take pictures of his bag in the Gym. Since these people were unknown to him and they had no reason to take pictures of the bag, M. put it away. This bag had been given to him by the Athlete as a gift after the 2005 World Championship in Helsinki and M. cherished it ever since. He kept personal possessions in the bag including a belt and knee protectors. The Athlete did not use the bag at all. There were about 10 people in the Gym on the day in question, and it was possible that the Athlete went into the small room at the Gym without M. seeing him.

THE FACTS: EVENTS AT THE ATHLETE'S HOME ON 15 DECEMBER 2011

52. In the period between 11 August and 15 December 2011, the IAAF decided to direct H. to conduct a further Out of Competition Test on the Athlete and at the same time, to ask him questions about the events of 11 August 2011. In order to facilitate matters, the IAAF instructed X., a Hungarian lawyer fluent in English […], to attend with H. and his assistant B.

53. The test took place at approximately 07.00 at the Athlete's home. It was conducted successfully and proved negative. Following the taking of the sample which was uneventful, H. put questions to the Athlete. His account of what occurred in his DCO Report of 26 January 2012 and confirmed in his oral evidence was as follows:

"As I was packing up, I asked [the Athlete] about the previous time I had tried to test him at his training location back in August, in particular, why he had suddenly left the training location after I had notified him for testing. [The Athlete] pointed to a logo of a helicopter base on his t-shirt and said that he had had to go to work. I then asked him if he was aware that he was not allowed to leave the training location once he had been notified and he replied "I had to leave". He said he was only at the training location to do some exercise but that it was not a proper training session. I insisted that that was not relevant, he was present at the training location and he had been notified for a doping test. [The Athlete] hesitated and then referred to a paper that he believed he had to fill out before doping control. As his copies of the DCF were still on the table, I pointed to them and asked if he was referring to such forms, but he only said: "a paper". He was not very clear in his answer.

We headed to the entrance of the house and got ready to leave. I asked [the Athlete] again if he remembered me having been at his training location in August and he answered "yes" then "maybe". We said goodbye to Mr. Kövágó and left his house".

54. B. confirmed this statement, as did X. Curiously, X. had been instructed not to interpret or intervene in the Sample collection unless he was asked to do so and so he remained mute throughout the proceedings.

55. The account of 26 January 2012 differed from the account which H. had given in his "DCO

Report" of 2 January 2012. The earlier DCO Report used only the term "yes", the DCO Report of 26 January 2012 extended the wording behind "yes" to "then maybe".

56. The Athlete's account of the meeting was that H. was aggressive. The Athlete never admitted to H. that he had met him on 11 August. His knowledge of English was minimal and he had not understood what H. was saying to him. He accepted that he had previously met H., but not in August: it had been on an earlier occasion when H. had conducted a test on him.

57. Following their visit to the Athlete's home, H., together with B. and X., visited the Gym and saw I. At this meeting, X.'s services as an interpreter were used. She recalled H.'s previous visit and taking him and B. through to the Gym premises at the back of the building and leaving them with M. Neither H. nor B. recounted her saying anything about the Athlete's presence on 11 August. X.'s account is that she said she could not recall whether the Athlete had been in the Gym that day or not. In her evidence, I. said she told them that she recognised them but also explained that she remembered that she had shown them to M. because the Athlete was not in the Gym on 11 August 2011.

THE CLAIMANT'S SUBMISSIONS

58. Below is a summary of the parties' submissions. Although the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, it refers in its Award only to the submissions and evidence it considers necessary to explain its reasoning.

59. On behalf of the IAAF, it was submitted that there was no logical basis for upholding the Decision of the Committee. In any event, the appeal was by way of a complete re-hearing and the Panel therefore had to look at the case entirely *de novo*.

60. There was no reason to disbelieve the clear account given by H. and supported by B. H. had no reason to invent a story. He was an extremely experienced DCO. Once his evidence was accepted, it was inevitable that the appeal be allowed. The Athlete had been approached to be tested and had avoided giving the necessary sample by leaving the Gym and driving away.

61. There could be no doubt that he would have understood H. when addressed in English, as was demonstrated by a television interview he had given in English at the age of 18. He had accepted that he had met with H. on 11 August at the subsequent Out of Competition Test on 15 December 2011 when he had in effect sought to excuse his failure to take the test by indicating he had had to return to the Helicopter Base. There was no basis on which the Athlete could avoid a two year period of ineligibility.

THE RESPONDENTS' SUBMISSIONS

62. On behalf of the Athlete, it was submitted that the IAAF case rested essentially on the evidence of H. B. had been inspecting the Gym for an appropriate place to take the sample at the material time. The Athlete had declared himself opposed to any form of doping and over a very long career had been tested many times without any adverse analytical finding. There was independent evidence from other witnesses to support the Athlete's account of events. Further, there was evidence from the Athlete's mobile phone records that he had not made calls at the times asserted by H. and independent evidence from his commanding officer that he had been allowed to leave the Helicopter Base from 10.15 to 11.15. When the Panel considers the evidence, it should bear in mind that H.'s accounts of the timing could not be correct: the timings on the photographs he took which he claimed to have been only a few minutes after the Athlete had driven away showed that he could not have arrived as early as he asserted, and could not therefore have coincided at the Gym with the Athlete. Because of the short period the Athlete was permitted to leave the Helicopter Base, he could not have been training at the Gym that morning as H. inferred. The Decision of the Committee had been the correct one. The Panel could not be comfortably satisfied that the Athlete had evaded the test.

63. On behalf of the HAA, it was emphasised that it had always taken its duty to enforce anti-doping controls very seriously and the Committee had engaged in a detailed examination of the case. Its decision should be upheld.

DISCUSSION

64. Under the IAAF Competition Rules, the appeal was by way of a complete re-hearing and not by way of a review of the decision of the Committee. While the Panel appreciated that the Committee had clearly considered the matter in detail, the decision on the appeal must depend on the evidence made available to the Panel, rather than a re-consideration of the evidence before the Committee. For example, it appears that the Committee was critical of H. (who they did not have the advantage of seeing giving evidence in person) because he had not attended the Helicopter Base to attempt to test the Athlete. They were not made aware of the fact that H. could not have known of the change in the Athlete's availability because the alteration of his whereabouts for testing on 11 August was not published until after H. had (on his account) attempted to test the Athlete and failed.

65. There were a number of points on which the IAAF sought to rely in making its submissions, points which to the Panel, did not carry much weight.

66. The assertion that there could have been no misunderstanding of H. by the Athlete either on 11 August or on 15 December when H. addressed the Athlete in English was unfounded. The reliance put on a television interview conducted by the Athlete in English a number of years ago, at a time when he was competing as a Junior, did not bear scrutiny. It was apparent from

watching the interview that the Athlete had great difficulty in understanding what were simple (and pretty standard) questions put to him and his answers, apart from one sentence of appreciation of one of his fellow competitors, were effectively monosyllabic. It was particularly unfortunate that having taken the precaution of bringing X. to act as interpreter, he was prevented from doing so.

67. The assertion that the Athlete must have acquired a working knowledge of English because he had been on the international circuit for a number of years was also flawed. If it had been intended to demonstrate that the Athlete was known to have a reasonable command of the language, evidence to that effect should have been produced.

68. The Panel was unable to accept that the alleged response "yes" followed by "maybe" to H.'s query on 15 December 2011 as to whether the Athlete recalled meeting him at the Gym in August amounted to an admission, given the language difficulty and the fact that H. had tested the Athlete at the Gym on a previous occasion.

69. The identification of the initial "K" on the number plate of the car on which the Athlete was said by H. to have driven away was of little assistance, it appeared that all vehicles of that age and registered in that area would have borne an initial "K" in the registration mark.

70. So far as the evidence of B. is concerned, the Panel found her identification evidence of little assistance. Unlike H., she had not had previous dealings with the Athlete and there was no evidence that she had checked his appearance against a photograph. She did not have the same opportunity of studying the Athlete as H. did because she went to find a suitable place to conduct the test. When she saw the Athlete on 15 December, she was expecting to see the same person as she had seen or claimed to have seen in August. In such circumstances, her identification of the Athlete on 15 December 2011 carries little weight. It does not follow however, that her evidence of the sequence of events at the Gym should be discounted.

71. Leaving aside the unconvincing points relied on by the IAAF, it is common ground that H. and B. attended the Gym on the morning of 11 August. It is also common ground that the Athlete was at the Gym and that, at the least, their presence must have very nearly coincided in completely coincidental circumstances. The Athlete told the Committee and accepted in his evidence before the Panel that he had seen two "strangers" while he was at the Gym. This statement would tend to confirm that H. and B. had also seen him.

72. It was not suggested that the interaction to which H. spoke with a person he identified as the Athlete in fact took place with some other person (ie that this was a case of mistaken identity on the part of H.) Nor was it suggested that there was any other person on the premises who bore such a resemblance to the Athlete that H. might have mistaken him for the Athlete. The Athlete is a man of striking physique. H. had previously met the Athlete and had refreshed his recollection as to the Athlete's appearance by looking at his photograph on the internet.

73. H. identified the car in which he said the Athlete drove away as being an Audi Q7. This was

the type of car which the Athlete accepted he owned at that time (though he has subsequently disposed of it).

74. Once the person identified by H. as the Athlete had driven away, H. took a photograph of the bag from which he says he saw the Athlete take what he believed was a wallet and some keys. No explanation was offered as to why H. should have taken such a photograph if he had not seen the person who drove away take something from it. It would be far-fetched in the extreme to suggest that by the time the photograph was taken at 11.20, H. had for some unexplained reason, decided to photograph the bag with a view to asserting falsely that he had seen the Athlete removing something from the bag, and that fortuitously he had happened to choose to photograph a bag which was, at least at one time, the Athlete's bag.

75. The Panel accepted the unchallenged corroborative evidence that H. had telephoned IDTM and reported his version of events to them and then been told to wait (as he did) for the full hour. If the true position was that he had arrived at the Gym and simply found that the Athlete was not there, it is inconceivable that he would have on the spur of the moment, made up an elaborate story and telephoned it in to IDTM. If his concern was simply to report that he had arrived at the place which he understood to be the appointed place and the Athlete was not there, he would simply have said so and waited until the hour was past. That would, so far as the information available to him as to the Athlete's notified whereabouts, have resulted in him putting in a report that the Athlete had not been present for testing.

76. H. made his report the same evening. Although it was suggested that there was no independent evidence to verify the date of 11 August on his report, equally there was no evidence to support any submission that the report might have been made at a later date and antedated. No reason was given as to why H. should have made up an elaborate story as to his encountering the Athlete and the Athlete in effect fleeing a doping control test. There was no benefit to H. in constructing such a story, let alone one which so far as he knew might well have been contradicted by independent alibi evidence placing the Athlete elsewhere. While the fact that H. is an experienced DCO does not mean that his evidence is entitled to any special treatment, his lengthy and unimpeached service and the absence of any motive whatsoever for concocting his evidence weigh in favour of accepting it.

77. If the Athlete's version of the events were accepted, the Panel would have to conclude that H. made up a very elaborate story and tried to substantiate it with photographs. There is no reason to do so when the Athlete's own evidence was that he was at the Gym that day at approximately the same time as the Doping Control Officials and that he owned an Audi Q7 which the DCO will likely only know if he actually observed the car leaving the Gym parking lot.

78. So far as the evidence provided on behalf of the Athlete was concerned, I. by her own account, frequently did not see the Athlete when he was at the Gym because he would come and go by the back door. A. and M. were long-standing acquaintances of the Athlete and had the use of the athletic gear which the Athlete left at the Gym, in M.'s case, on his account

someone to whom the Athlete had given the photographed bag. They had clear reasons for supporting the Athlete in his account of events.

79. So far as the evidence provided of the permission given to the Athlete to leave the Helicopter Base is concerned, this was provided by a certificate three months after the event, rather than by a copy of any contemporaneous permission. There was no evidence as to how strictly the timings were adhered to or from anyone at the Helicopter base as to when the Athlete left or returned.

80. The evidence as to timings was at best inconclusive. The only "hard" times were those provided by the photographs. The strong probability is that these were correct: in particular, the timing of the last photograph at 12.04 coincides with the evidence that it was taken after the Gym was shut and when H. was about to depart. It was common ground that the Gym would close at about midday. The suggestion that the Athlete had not left the Helicopter Base before 10.15, but had then driven to the Gym and then spent 4 or 5 minutes there collecting a small amount of equipment, noting the presence of two unidentified strangers, and then left again without making any contact or without having any interaction with H., who arrived on his account somewhere about 10.35 or 10.40, lacks credibility.

CONCLUSION

81. Taking all the circumstances together, the Panel was comfortably satisfied that H. did, as he said, make contact with the Athlete and that the Athlete then evaded the taking of an Out of Competition Doping Control Test by leaving the Gym and driving away. Accordingly the appeal must be allowed.

82. No argument was addressed to the Panel as to why, if the appeal was allowed, the Athlete should not have to serve a two year period of ineligibility under IAAF Rule 40.3(a) commencing from the date of the CAS hearing with credit given for any period of suspension previously served or as to why all competitive results obtained by the Athlete from the date of commission of the anti-doping rule violation through to the date of the CAS hearing should not be disqualified, with all resulting consequences, in accordance with IAAF Rule 40.8. The Panel accordingly so directs. The Panel notes in this regard, that by letter dated 6 July 2012, the IAAF advised the Athlete that *"The Doping Review Board has decided for the IAAF to appeal the HUNADO decision to CAS and has determined to provisionally suspend Mr Kövágó pending the outcome of the CAS procedure"*.

83. The Panel adds by way of addendum, that this was not a case in which an athlete in some type of public service has failed or refused to take a test asserting force majeure in the form of a requirement to comply with some form of lawful order. The Athlete never asserted that he had failed to take the test because he was required to return to his post by a given time.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeal filed by the IAAF against the decision of 6 June 2012 rendered by the Doping Committee of the Hungarian National Anti-Doping Organisation is upheld.

2. The decision of 6 June 2012 rendered by the Doping Committee of the Hungarian National Anti-Doping Organisation is set aside.

3. Mr Zoltan Kövágó is sanctioned with a ban of two years starting from the date of the present award, with credit given for any period of suspension previously served.

(…)

6. All further claims are dismissed.